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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR SALGADO, Defendant and Appellant.	B206566 (Los Angeles County Super. Ct. No. BA277276)

APPEAL from a judgment of the Superior Court of Los Angeles County. David S. Wesley, Judge. Modified in part; affirmed in part.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Chung L. Mar and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Victor Salgado was convicted, following a jury trial, of one count of attempted voluntary manslaughter in violation of Penal Code[1] section 192 and 664, a lesser included offense of the charged crime of attempted murder, one count of battery causing great bodily injury in violation of section 243, subdivision (d), a lesser included offense of the charged crime of mayhem, and one count of shooting at an occupied vehicle in violation of section 246. The victim of all three crimes was Roberto Isita. The jury found true the allegations that all the offenses were committed to benefit a criminal street gang within the meaning of section 186.22. With respect to the shooting at a vehicle offense, the jury also found true the allegations that appellant personally used and discharged a firearm within the meaning of section 12022.53, subdivision (b), (c), and (d), a principal personally used and discharged a firearm within the meaning of section 12022.53, subdivisions (c), (d) and (e), and a principal was armed within the meaning of section 12022, subdivision (a)(1). The jury further found true the allegation that appellant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The trial court sentenced appellant to a total term of 30 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in permitting the prosecutor to question appellant's girlfriend about his prior bad acts and in denying his motion for a new trial based on juror misconduct. We affirm the judgment of conviction.

Facts

On January 15, 2005, about 5:20 p.m., Los Angeles Police Sergeant Richard Baeza was driving an unmarked car on Figueroa Street. As he drove past 54th Street, he saw appellant standing at the front door of a store. Co-defendant Sandor Garcia was standing nearby and looking up and down the sidewalk. Sergeant Baeza believed that the men were planning to rob the store. He called for back-up, then turned and made a

[1] All further statutory references are to the Penal Code unless otherwise indicated.

U-turn to drive back toward the store. Sergeant Baeza then noticed that appellant and Garcia were no longer in front of the store. He saw them near a Dominos.

Sergeant Baeza turned into a parking lot, and saw appellant and Garcia running through the parking lot. Appellant extended his hand. There was a gun in it. Sergeant Baeza heard two gunshots. The sergeant did not see a weapon in Garcia's hands. Sergeant Baeza saw a blue Blazer driving away from the area.

Sergeant Baeza called for backup and followed appellant and Garcia. The two men went to a house in the 5400 block of Figueroa. Jose and Salvador Lomeli were on the porch of the house. The two men went in and out of the house several times. Garcia discarded the beanie he had been wearing and appellant changed his shirt.

Other police cars and a helicopter soon arrived. Appellant and Garcia were taken into custody. Sergeant Baeza identified the two men as the ones involved in the shooting he had witnessed. About fifteen minutes elapsed between the shooting and Sergeant Baeza's identification.

Police soon learned that a gunshot victim was being treated at a clinic about four blocks away. The victim was Roberto Isita. He had sustained the gunshot when he went with his brother Alberto to pick up clothing from a dry cleaner's near Figueroa and 54th Streets. The brothers were in a blue SUV. When they turned into the driveway of the dry cleaner's, Roberto noticed appellant and Garcia approaching. Roberto felt that something was going to happen and told Alberto to leave the parking lot. Garcia asked Roberto: "Where you from [?]" Roberto replied: "Nowhere" or "We don't bang." Garcia looked at appellant. Roberto noticed that appellant was pointing a small black gun at him. Appellant shot twice at Roberto and hit him once, in the face. Roberto said that he had been hit, and Alberto drove away very fast to the clinic.

Roberto was taken from the clinic to a hospital for treatment. Alberto was taken to a field show-up. He identified appellant as the shooter and Garcia as the man who asked his brother where they were from.

At the police station, Officers Navarro and Duncan interviewed Garcia. Garcia told Officer Navarro that he was an active member of the B.M.S. gang. Jose and Salvador Lomeli also admitted that they were B.M.S. gang members.

Officer Art Talamante testified at trial as a gang expert. He was familiar with the B.M.S. (Barrio Mojada) gang. It was a predominantly Hispanic gang with about 100 members. Falsely claiming membership in B.M.S. would result in retaliation from members. The shooting in this case took place in an area claimed by B.M.S. The Lomelis' house was a gang hangout.

In Officer Talamante's opinion, appellant was a member of B.M.S. His opinion was based on police records, appellant's tattoos, and an admission by appellant that his gang moniker was Aztek, made when he was stopped by police in 2003 in the company of Salvador Lomeli. Officer Talamante also opined that Garcia, Jose Lomeli and Salvador Lomeli were members of B.M.S.

The gang's primary activity was to commit crimes, including shootings, robberies and narcotics sales. Miguel Miranda, a B.M.S. gang member, was convicted of robbery in 2003, along with two other B.M.S. gang members. They identified themselves as gang members to the victim. Gerardo Martinez, a B.M.S. gang member, was convicted of murder in 2003. He was accompanied by two other B.M.S. gang members at the time of the killing. The victim was believed to be a member of a rival gang.

In a hypothetical based on the facts of this case, Officer Talamante opined that the shooting was for the benefit of B.M.S. as well as individual gang members because it was committed within the gang's claimed territory.

Garcia testified on his own behalf at trial. He denied being a B.M.S. gang member and stated that he did not believe that appellant was a gang member. Garcia was not involved in the shooting at issue in this case. He went to the 99 Cent Store alone. As he left he heard gunshots. He ran towards the Lomeli house, passing appellant along the way. Appellant was limping.

Appellant offered evidence that his hands were tested for gunshot residue, but none was found. The examiner viewed the results as inconclusive.

Appellant's girlfriend Jasmine Lozano testified at trial. Appellant and Lozano had two children together. She was pregnant when appellant was arrested. She testified that prior to his arrest in this case, appellant had been working at a Shell Station in Santa Clarita every morning. On cross-examination, Lozano acknowledged that she was aware that appellant had been arrested in the past. She also acknowledged that appellant had B.M.S. gang tattoos and that she believed that he had been in that gang. She also testified that he had moved away from the gang since he had a family.

The parties stipulated that if Kenneth Hurley were called as a witness he would testify that he was an employee supervisor at the Shell Station and that appellant had been an employee of the Shell Station for two years and was "a very hard worker, very respectful and not missing a shift of work." They also stipulated that Michael Granskog would testify that he was an employee of Ashdon Development, located at the same address as the Shell Station and that appellant had worked for Ashdon for the past few years and had been "punctual and professional."

Discussion

1. Prior bad acts

Appellant contends that the trial court abused its discretion in allowing the prosecutor to cross-examine Lozano about specific prior bad acts of appellant. He further contends that if his counsel's questions to Lozano opened the door to the questioning, he received ineffective assistance of counsel.

When a defendant offers evidence of his good character at trial, the prosecution may impeach or rebut that evidence. (*People* v. *Clair* (1992) 2 Cal.4th 629, 683-684; Evid. Code, § 1102.) Generally, the evidence offered by the prosecution must relate directly to the particular character trait shown by the defendant. (*People* v. *Rodriguez* (1986) 42 Cal.3d 730, 792 & fn. 24.)

A trial court's decision to admit or exclude evidence is reviewed under the deferential abuse of discretion standard. (*People* v. *Waidla* (2000) 22 Cal.4th 690, 724.) A trial court abuses its discretion only if it exercises its discretion in "an arbitrary,

capricious or patently absurd manner" that results in a manifest miscarriage of justice. (*People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, a gang expert called by co-defendant Garcia testified that holding a job is inconsistent with active gang membership. Appellant's counsel reached an agreement with the prosecutor permitting appellant to enter into evidence two letters from appellant's employers showing that he was a reliable, hard-working, respectful employee.

Appellant called his girlfriend Lozano as a witness. She testified that appellant had been working for a long time at a gas station and went to work every day. The prosecutor questioned the relevance of this testimony. Appellant's counsel mentioned the two employer letters and agreed with the trial court that Lozano's testimony was character evidence. The prosecutor then stated his belief that he could cross-examine Lozano about her knowledge of appellant's prior arrests and gang membership. The court agreed with the prosecutor. Appellant's counsel sought to withdraw his questions, but the trial court denied this request.

Appellant contends on appeal that Lozano's testimony was not evidence of good character and should not have been subject to rebuttal with bad character evidence.

Lozano's testimony that appellant worked regularly, together with Garcia's gang expert's testimony, was evidence that appellant was not a gang member. Even if we assumed for the sake of argument that Lozano's testimony about appellant's work habits was not technically character evidence, we would see no error in permitting the prosecutor to cross-examine Lozano on this point. Appellant's gang membership was at issue in the case. Lozano's testimony on direct examination about appellant's work habits amounted to a denial of appellant's gang membership. Lozano was a person who could

reasonably be expected to have knowledge of appellant's gang membership status. It was appropriate to cross-examine her on this issue.[2]

Lozano did not testify that appellant was honest or had a good character. Considered without reference to the gang expert's testimony, Lozano's testimony about appellant's work habits implied at most that appellant was a hard-working reliable employee. This is a form of character evidence. Evidence that appellant had been arrested on matters unrelated to his employment does not seem to relate directly to his character as a reliable or hard-working employee, and so should not have been permitted.[3] We see no prejudice to appellant from these questions, however.

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[2] Appellant contends that if his counsel's questions to Lozano opened up the door to questions about his character, he received ineffective assistance of counsel. Lozano's questioning did open the door to questions about appellant's gang membership, but we see no possible prejudice from Lozano's testimony, and hence no ineffective assistance of counsel. Lozano testified that appellant was a member of B.M.S. but that it was different now that appellant had a family. He had made a decision to move away from criminal behavior. Appellant himself acknowledged past gang membership, but claimed that he was no longer active. As we discuss, *infra*, counsel's question to Lozano did not open the door to questions about appellant's prior arrests. Thus, there was no ineffective assistance of counsel with respect to that testimony.

[3] The trial court viewed Lozano's testimony as related to the letters from appellant's employers and characterized them together as stating that appellant was an honest hard-working employee. Appellant's trial counsel agreed with this assessment. The letters do not refer to appellant as honest. As we discuss, *supra*, Lozano did not testify or imply on direct examination that appellant was honest. Had there been any mention of appellant's honesty in connection with his employment, questions about his arrests might have been relevant. Since appellant's counsel's questions did not open the door to questions about appellant's past criminal conduct, those questions did not constitute ineffective assistance.

Appellant also contends that his counsel was ineffective for failing to object to the arrests pursuant to Evidence Code section 352 as being more prejudicial than probative. Such an objection would almost certainly have been futile. Counsel was not required to make a futile objection. (*People* v. *Price* (1991) 1 Cal.4th 324, 386-387.) In addition, as we discuss, *infra*, appellant was not prejudiced by the arrest evidence. There is no possibility that he would have received a more favorable outcome if the arrests had not been discussed. Absent such a showing, appellant's ineffective assistance claim fails. (See *People* v. *Ledesma* (1987) 43 Cal.3d 171, 216-218 [setting forth elements of claim].)

The jury was specifically instructed pursuant to CALCRIM No. 351: "The attorney for the People was allowed to ask defendant's character witnesses if (they) had heard that the defendant had engaged in certain conduct. These 'have you heard' questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider these questions and answers only to evaluate the meaning and importance of (the) character witness's testimony."

The prosecutor began his cross-examination by asking if employment was a factor Lozano considered about appellant's good character. Lozano agreed that it was. Thus, the jury was aware that the prosecutor viewed Lozano as a character witness. The prosecutor then asked her if she had heard about appellant's prior arrests. Lozano acknowledged hearing about the arrests, but explained why she did not believe that they were justified.

Jurors are presumed to understand and follow the court's instructions. (*People* v. *Holt* (1997) 15 Cal.4th 619, 662.) There is nothing here to rebut that presumption. There was no evidence that appellant was convicted of the offenses for which he was arrested, which renders the information considerably less prejudicial. The offenses themselves were not particularly inflammatory. One involved a physical altercation with a neighbor while the others were "theft-related offenses" with no details provided.

2. Juror misconduct

Appellant contends that the trial court erred in denying his motion for a new trial based on juror misconduct. Appellant claims that jurors improperly discussed the case and formed opinions of his guilt before deliberations began. We do not agree.

A motion for a new trial may be made on the ground of juror misconduct. (§ 1181, subd. (3).) Jurors may not "converse among themselves . . . on any subject connected with the trial" or to "form or express any opinion thereon until the cause is finally submitted to them." (§ 1122, subds. (a) & (b).) A violation of this prohibition is misconduct.

Juror misconduct creates a presumption of prejudice. (*People* v. *Cooper* (1991) 53 Cal.3d 771, 835.) "This presumption of prejudice '"may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party [resulting from the misconduct]. . . ."'" (*In re Hitchings* (1993) 6 Cal.4th 97, 119.)

In determining whether misconduct occurred, the reviewing court accepts that trial court's credibility determinations and findings of historical fact if supported by substantial evidence. Whether the juror misconduct caused prejudice is a mixed question of fact and law subject to the reviewing court's determination. (*People* v. *Majors* (1998) 18 Cal.4th 385, 417.)

Here, appellant's counsel moved for access to juror information to investigate possible juror misconduct. In support of that motion, counsel filed a declaration stating that he had spoken with Juror No. 1 and Juror No. 5 after trial. Juror No. 5 said "that all or most of jurors were discussing the details of the case before it was submitted to them." Juror No. 1 "confirmed that but emphasized that the discussions were usually brief because another juror would cut [off] the discussion reminding the jurors of the judge's admonition." The trial court decided to call the jurors in for a hearing on the potential misconduct rather than reveal the jurors' personal information. Ultimately, there were a number of hearings because not all jurors were available on the same date.

At the hearings, Jurors Nos. 2, 4, 7, 8, 9, 11 and 12 and Alternate Jurors 1 and 2 each testified that he or she did not have any discussions with other jurors about the case and did not hear other jurors talking about the case, or express an opinion about appellant's guilt.

Juror No. 3 testified that on one occasion, Juror No. 5 asked if she could ask Juror No. 3 a question about the case. Juror No. 3 did not believe that she heard or answered the actual question because it was noisy. After Juror No. 5 asked the question, Juror No. 3 looked at Juror No. 6. Juror No. 5 said that Juror No. 6 "was cool." This comment caused Juror No. 3 to believe that Jurors 5 and 6 had been discussing the case with each

other. Juror No. 3 did not hear anyone discuss the facts and circumstances of the case before deliberations.

Juror No. 3 volunteered that other jurors had commented: "Oh, I feel sorry for [appellant's] family." Counsel asked if she meant that "it's too bad for the family because he's guilty; is that correct?" Juror No. 3 responded: "Yes, because he was trying to turn his life around." Appellant's counsel asked: "And it's too bad for the family because [appellant] is guilty before deliberations, am I right?" Juror No. 3 replied: "I don't think anybody had their mind set yet. I know I didn't so -- . . . I just took it as they felt sorry for him, you know, because he was turning his life around, and it's just a shame that *if* he was going to be guilty, then it's a shame that his family had to go through that." (Emphasis added.) None of the comments Juror No. 3 heard about appellant affected her judgment or caused her to be biased against him.

Juror No. 5 testified that jurors would talk about the case before deliberations. She could not recall any specifics of the discussions, but felt the jurors were expressing their opinions about appellant's guilt from the beginning. She could not "pinpoint anybody specifically" who discussed appellant's guilt. Juror No. 5 denied talking to any other juror about appellant's guilt or innocence.

Juror No. 5 also testified that while in the jury room the jurors would discuss whatever testimony they had heard during the day. She testified that this would happen frequently. The only jurors she could remember any specifics about were Jurors Nos. 1 and 10. Juror No. 1 said: "Oh, I confess, [Juror No. 10] and I have been discussing the characters."

Juror No. 5 testified that she did talk about the facts of the case. The only person that she discussed the facts of the case with was Juror No. 6. She did not remember specifics, but the remarks were brief comments on whoever was on the witness stand. It was not an analysis of the case. Juror No. 5 believed that the comments she overheard did not affect her ability to be fair and impartial and that she made her own independent unbiased judgment based on the evidence and the law. She kept an open mind.

Juror No. 6 testified that she did not have any discussions with any of the jurors about the facts of the case, including Juror No. 5. She did not hear Juror No. 5 discuss the facts of the case. Juror No. 6 said that on one occasion before deliberations she heard Juror No. 3 say "Yeah, he's guilty." This occurred in the jury room before deliberations. Another juror said that they were not supposed to be discussing the case. Juror No. 6 did not know which defendant Juror No. 3 was referring to. Apart from this instance, Juror No. 6 did not hear any jurors discussing the facts of the case before deliberations. The comment about guilt did not affect Juror No. 6's ability to be fair and impartial in the case.

Juror No. 1 testified that a couple of times jurors discussed the case briefly prior to deliberations. They were "humorous asides." In one instance, jurors laughed about appellant's co-defendant's counsel's attempt to demonstrate emotions as part of a question he was asking a witness. Another time there was some humor about the prosecutor's statement to a witness that he knew how the witness felt, because the prosecutor had just been on the stand. Juror No. 1 made "the occasional offhand comment" about the case to Juror No. 10. She would reply that they could not discuss the case. Juror No. 1 did not make or hear comments about appellant's guilt. There was no analysis of the facts.

Juror No. 10, the foreperson, did not discuss the case with Juror No. 1. She did not hear any discussions of the case by other jurors. She did hear occasional comments about the case. These comments were just a few words. Before the sentence was finished, the speaker or someone else would say that they could not talk about the case. In one case, a juror completed a comment about the case, probably a reference to something that had just happened in court. It was not about appellant's guilt. Juror No. 10 stopped the discussion. The comment did not affect Juror No. 10's judgment or her ability to be fair and impartial.

Two months after the hearings, appellant's counsel filed his motion for a new trial based on juror misconduct. The trial court denied appellant's motion. The court ruled: "We talked to every single juror, including the alternates. Juror 3, which you examined extensively, was asked specifically whether or not anything she heard affected – did she

prejudge this, was she leading towards guilt before they went in, and she said no. [¶] And each of the jurors indicated that nothing they heard by any other juror – most of them heard nothing. But any of the few that heard anything were not affected by it, it did not enter into their deliberation process and it did not affect their ability to be fair and impartial to [appellant]. [¶] That being the case, I think we know exactly what happened. It's clear that maybe a few of the jurors did not follow the court's instructions and did discuss the case briefly with one another, but were told to stop it by jurors [who] felt the instructions should be followed, but there was no irreparable harm done, based on the testimony that I heard in this court from each of the jurors. So the motion for new trial is denied."

There is substantial evidence to support the trial court's finding that there were only a few brief comments, heard by only a few jurors and that those comments did not affect the jurors' ability to be fair and impartial.

Seven jurors and two alternates testified that they heard no discussion of the case whatsoever before deliberations. The court found the testimony of these jurors credible.

One juror, Juror No. 6, heard only one comment about the case. Two jurors, Jurors Nos. 1 and 10, heard only brief comments which were cut off. The comments heard by Jurors Nos. 1 and 10 did not involve guilt or an analysis of the case. These three jurors testified that nothing they heard affected their ability to be fair or impartial. The court found the testimony of these jurors credible.

Only one juror, Juror No. 5, claimed that many jurors had prejudged the case and discussed appellant's guilt from the beginning of the trial and also discussed the facts of the case from the beginning of the trial. The trial court's ruling shows that it found Juror No. 5 not credible on this issue.[4] Juror No. 6 did claim that Juror No. 3 stated that appellant was guilty before deliberations began, but Juror No. 3 gave a different account of her statements. As the trial court pointed out, Juror No. 3 was extensively cross-

[4] As the court did with all the other jurors, the trial court found credible Juror No. 5's claim that nothing she heard affected her ability to be fair and impartial.

examined and maintained that she did not prejudge the case. Thus, the trial court also impliedly found Juror No. 6 not credible. The trial court was in the best position to assess the credibility of the juror-witnesses and resolve the conflict in the evidence. Accordingly, we accept the court's determinations of credibility and findings of historical fact.[5]

We hold that the jurors' discussion of the case before deliberations was technically misconduct and therefore raised a presumption of prejudice. This presumption was rebutted by the jurors' testimony about the nature and effect of those comments. The comments were brief and did not involve an analysis of the case or the prejudging of guilt. Further, the comments were made among the jurors, and so were less serious than comments made to a witness, party, attorney or nonjuror. (See *People* v. *Wilson* (2008) 44 Cal.4th 758, 838, 840.)

To the extent that appellant contends that the misconduct violated his state and federal constitutional rights to a trial by twelve impartial jurors, we do not agree. There was no prejudice to appellant from the brief comments made by the jurors to each other, and each juror testified under oath that his or her ability to be fair and impartial was not affected by the comments. Thus, appellant had a trial by a jury of twelve impartial jurors.

3. Security fee

Respondent contends that the trial court erred in failing to impose a court security fee of $20 pursuant to section 1465.8 for each count of which appellant was convicted. Respondent is correct.

A court security fee must be imposed for each conviction of a criminal offense. (*People* v. *Schoeb* (2005) 132 Cal.App.4th 861, 863, 865-867.) Appellant suffered three such convictions, but the trial court imposed only one security fee. Two more fees must be added. We so order.

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[5] If we were to review the evidence independently, we would reach the same conclusions as the trial court.

Disposition

Two additional $20 security fees pursuant to section 1465.8, subdivision (a)(1) are ordered imposed in this case, for a total of $60 in such fees. The clerk of the superior court is instructed to prepare an amended abstract of conviction reflecting these added fees and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KIREIGLER, J.